Supreme Court, U.S.
FILED
JAN 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-533
No. 88-549

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THERESE U. DONNELLY, Personal Representative of the Estate of Joseph F. Donnelly, Deceased,

Petitioner,

v.

EKLUTNA, INC., UNITED STATES OF AMERICA, SECRETARY OF THE INTERIOR AND DIRECTOR, BUREAU OF LAND MANAGEMENT, and JAMES W. LEE,

Respondents.

JAMES W. LEE,

Petitioner,

v.

EKLUTNA, INC., UNITED STATES OF AMERICA, SECRETARY OF THE INTERIOR, DIRECTOR, BUREAU OF LAND MANAGEMENT,

Respondents.

REPLY TO OPPOSITIONS TO PETITIONS FOR WRITS OF CERTIORARI

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REPLY TO OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI

Petitioners Therese U. Donnelly and James W. Lee reply briefly to the oppositions to their petitions for writs of *certiorari*. Petitioners emphasize respondents' misreading of the opinion below. It is reasonable to conclude that, if the government had read the opinion below as petitioners and *amici* read it, then the government would have responded differently to the petitions. The government's response demonstrates, at a minimum, that the opinion below may be susceptible to different readings which this Court should clarify by review. The lower courts which administer ANCSA will ultimately have to struggle with these different interpretations if this Court were to forego this opportunity of clarifying the meaning of ANCSA and other legal issues raised below.

1. Contrary to the government's statement (government Opposition at page ___), the previous proceedings in *Lee v. United States et al*, 809 F.2d 1406 (9th Cir. 1987), *cert. denied sub nom Lee v. Eklutna et al*, 56 U.S.L.W. 3498 (1988) did *not* address the effect of the Alaska Native Claims Settlement Act ("ANCSA") on the constructive trust remedial doctrine of this Court.

2. Contrary to the government representation (Opposition, page ___), Donnelly's petition *did* raise and address the purported "indispensable party" issue.

> Under no theory is the United States a party to a Section 14(g) claim. It claims no interest in the land; no federal interest is in dispute. *Provident Tradesmen's Bank & Trust Co. v. Patterson*, 390 U.S. 102, 114, 119 (1968).

> That the United States issued the patent does not make it a party. *Daniels v. Wagner*, 237 U.S. 547, 567 (1915).

Donnelly petition, pp. 9-10. See also *Lee* petition at pp. 20-21. The Court of Appeals itself said Donnelly's constructive trust claim was pre-empted by ANCSA, not that the United States was an indispensable party to her non-Quiet Title Act constructive trust claim against Eklutna. Amended Opinion, App. p. 16a.

The United States' presence as a party is not required under a trust theory. Congress made clear that ANCSA created no trust relationship. House Report 92-523, 1972 U.S. Code Cong. & Ad. News, page 2199; Conference Report No. 92-746, page 2253; *United States v. Atlantic Richfield*, 435 F.Supp. 1009, 1018 (D.Alaska 1977), aff'd 612 F.2d 1132 (9th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980). Respondents' reliance on *Nichols v. Tyvasy*, 809 F.2d 1317 (8th Cir. 1987) is therefore misplaced.

3. Contrary to the government's assertion (Opposition, page ___), the Court of Appeals did *not* deny petitioners' Section 14(c)(1) claim on the merits. That court specifically denied their Section 14(c)(1) claim on the theory that the United States was an indispensable party which could not be joined. The Court of Appeals stated:

> Put another way, appellants' Section 14(c)(1) claims are, again, based on their title claim, which *cannot be resolved* in any action to which the United States is not a party. Accordingly, the Section 14(c)(1) claims are also barred by the QTA statute of limitations.

Amended Opinion, Donnelly Appendix 16a. Emphasis supplied. The opinion below, moreover, sets forth no facts which could support a decision on the merits.

Respondents appear to argue that the *Buettner v. Kavilco*, (9th Cir. No. 87-4435, Oct. 26, 1988) opinion shows that the United States is not an indispensable party to a Section 14(c)(1) claim. However, that is exactly what petitioners are contending. For this and other reasons demonstrated by petitioners, the decision below should be reversed.

Nowhere do respondents address the effect of ANCSA Section 26 (uncodified), discussed in Donnelly's petition at 21. ANCSA Section 26 cannot be reconciled with the Ninth Circuit Court of Appeals' explicit ruling that Section 14(c) claims depend on the pre-ANCSA status of the land, and respondents have not addressed this difficulty.

4. The government misconceives the significance of the *Donnelly* and *Hakala* decisions. *Hakala and Kitchen v. Atxam*, 753 P.2d 1144 (Alaska 1988). The government argues that *Donnelly* reaches only a narrow result, but the broad language employed in the opinion below will impact all land occupants in Alaska, whether the appeals court intended such result or not. *Donnelly* appears to direct a district court to dismiss any occupancy claim as to which the claimant cannot quiet his title against the United States. The state court interpretation, *Hakala*, conflicts with the *Donnelly* decision because the *Hakala* plaintiffs demonstrated no pre-existing right of occupancy, as *Donnelly* commands. The Ninth Circuit Court of Appeals acknolwedge, App. A, p. 16a, n.9, that the decision below conflicts with *Hakala*, and respondents have not addressed this fact.

5. Respondents argue that 28 U.S.C. Section 2409a(g) was triggered by the United States telling Donnelly that the United States claimed some land in the Eagle River Valley to be reserved. Until the government particularized its claim and stated what land inside Donnelly's claim was reserved, however, Donnelly could not draw a complaint that meets the requisites of a Quite Title Act complaint: "The complaint shall set forth *with particularity* . . . the right, title, of interest claimed by the United States." 28 U.S.C. Section 2409a(d). Until Donnelly knew that the boundary of the alleged reserve actually conflicted with his homestead tract, he could not meet this requirement. The QTA limitations period did not begin, therefore, until the United States in 1964 issued its final decision and declared to him the alleged boundary location. The appeals court itself was of the view that an actionable claim did not arise until completion of the administrative process. Amended Opinion, App. A, p. 12a. The error below was that court's disregard of the contents of the administrative record showing a continuous administrative proceeding which ended in 1964, not in 1961. Appendices F, G and H.

As to the sufficiency of notice in the Federal Register, it is fundamental due process jurisprudence that notice by publication is not sufficient where personal notice can be given. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), *Tulsa Professional Collection Services v. Pope*, 108 S.Ct. 1340, 1344, 1346 (1988).

In conclusion, petitioners submit that this Court should not be diverted by respondents' misreading of the decision below. They respectfully request the

Court to issue a writ of *certiorari* to address the issues raised by the decision below.

Dated at Anchorage, Alaska this 13th day of January, 1989.

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